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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

JUSTIN ROBERTS,

Defendant and Appellant.

B223005

(Los Angeles County
Super. Ct. No. BA362871)

APPEAL from a judgment of the Superior Court of Los Angeles County.

Ronald Rose, Judge. Remanded with directions.

James Koester, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Mary Sanchez and Shira B. Seigle, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Justin Roberts pled guilty, pursuant to a plea bargain, to one count of second degree burglary in violation of Penal Code¹ section 459. The People dismissed a charge that appellant had committed petty theft with a prior conviction in violation of section 666 and also dismissed the allegations that appellant had suffered one prior serious or violent felony within the meaning of section 667, subdivisions (b) through (i) and 1170.12 (the "Three Strikes" law) and served nine prior prison terms within the meaning of section 667.5, subdivision (b). In accordance with the plea agreement, appellant was sentenced to three years in state prison.

Appellant appeals from the judgment of conviction, contending that the trial court erred in finding, without an adversarial hearing, that he was entitled to only limited presentence custody credits under section 4019. Respondent contends that appellant's appeal should be dismissed because he is essentially challenging the validity of his plea without a certificate of probable cause. We conclude that a certificate of probable cause was not required. We hold that appellant was entitled to an adjudicative hearing and remand this matter for the trial court to either strike the conviction for purposes of section 4019 or hold an adjudicative hearing as set forth in this opinion.

Facts

On October 2, 2009, appellant entered a Vons supermarket, put a number of energy drinks in a nylon bag and left the store without paying for the drinks. He was stopped outside the store.

Discussion

1. Certificate of probable cause

Respondent contends that appellant is attacking the validity of the plea agreement and that he requires a certificate of probable cause to do so. Since appellant does not

¹ All further statutory references are to the Penal Code unless otherwise indicated.

have such a certificate of probable cause, respondent claims that the appeal must be dismissed.

We do not understand appellant's claim as attacking the validity of the plea agreement. There is nothing to suggest that the plea agreement explicitly covered any aspect of presentence custody credits. Appellant is contending that the amended version of section 4019 required that his prior conviction be pled and proved in an adversarial hearing before his presentence custody credits could be limited.² As such, no certificate of probable cause is required. (*People v. Cuevas* (2008) 44 Cal.4th 374, 379 [post-plea claims, including sentencing issues, that do not challenge the validity of the plea, are exempt from the certificate requirement].) We will consider appellant's claim.

2. Section 4019

On December 15, 2009, appellant pled guilty as part of a plea agreement. He was sentenced on January 25, 2010. On the date of appellant's sentencing, an amended version of section 4019 concerning presentence custody credits became effective. Under the amended version of section 4019, a defendant is entitled to four additional days of credit for every four days of actual custody, and thus is deemed to have served eight days for every four days of actual custody (as opposed to the old version, which gave defendants two additional days of credit for every four days of actual custody and thereby deemed a defendant to have served six days for every four days of actual custody). However, a defendant who has a prior serious or violent felony conviction within the meaning of the Three Strikes law is not entitled to full credit under the amended version of section 4019. He is entitled only to two additional days of credit for every four days of actual custody. The trial court sentenced appellant under the amended version of section

² Appellant contends that the pleading and proof requirements of sections 1025 and 1158 apply.

4019, and awarded two days for every four days of actual custody because the court found that appellant had a prior strike conviction.³

Appellant contends that the limitations of section 4019 increase the punishment for his offense. He concludes that in order to use a prior serious or violent conviction to limit credit under section 4019, the prior conviction must be pled and proven at an adversarial hearing in accordance with Penal Code sections 1025 and 1158. We hold that the allegation that appellant had suffered a prior conviction within the meaning of the Three Strikes law gave appellant adequate notice that his prior conviction would be used against him. We agree that appellant had a right to a hearing, but only to a court hearing, not a jury trial under section 1158.

Section 4019 does not contain any express requirement that a prior conviction be pled or proved. "There is authority for finding an implied pleading and proof requirement in criminal statutes." (*In re Varnell* (2003) 30 Cal.4th 1132, 1140.) We see no basis for implying such a requirement in the case of section 4019, however.

Established case law from this District Court of Appeal holds that there is no right to a jury determination of facts relating to presentence custody credits under section 2933.1, which limits such credits for a defendant who suffers a current conviction for, inter alia, a violent felony. (*People v. Garcia* (2004) 121 Cal.App.4th 271, 277; *In re Pacheco* (2007) 155 Cal.App.4th 1439, 1445.) The Courts in *Garcia* and *Pacheco* both held that a limitation on presentence conduct credits does not operate to increase the maximum punishment for a crime. "Rather, the provisions for presentence conduct credits function as a sentence 'reduction' mechanism" (*People v. Garcia, supra*, 121 Cal.App.4th at p. 277.) "Lessening the 'discount' for good conduct credit does not increase the penalty beyond the prescribed maximum punishment." (*Ibid.*) "A reduction

³ The issue of whether amended section 4019 applies retroactively is currently before the California Supreme Court. We note that if amended section 4019 did not apply retroactively, the prior version of section 4019 would award appellant 2 additional days of custody credit for every 4 days of actual custody, the same as the amended version. Appellant would be better off under the amended version of section 4019 only if the trial court struck the conviction or the People failed to prove the conviction.

in the worktime credits allowed by section 2933.1 may feel like 'additional punishment' to a prisoner . . . [but] such credits are benefits a prisoner earns based on good conduct and participation in qualifying programs." (*In re Pacheco*, *supra*, 155 Cal.App.4th at p. 1445.) Thus, the trial court determines whether a defendant's conviction limits his presentence custody credits.

We see no meaningful difference between section 2933.1 and amended section 4019. Accordingly, we hold that reduced custody credit under amended section 4019 is not increased punishment. A jury trial on the prior conviction is not required before the trial court can limit custody credits under amended section 4019.

Appellant's reliance on *People v. Lo Cicero* (1969) 71 Cal.2d 1186 is misplaced. That case involved ineligibility for probation due to a prior conviction, and the Court found that ineligibility for probation was an increase in punishment which required the prior conviction to be pled and proven to a jury. Probation is one of a possible range of punishments which may be imposed on a defendant after conviction. Barring probation removes a sentencing choice from the trial court, and guarantees a jail or prison sentence for a convicted defendant. The credit limitation of section 4019 does not affect the trial court's sentencing choices. Further, as we discuss above, it does not increase a defendant's maximum sentence.⁴

Although appellant is not entitled to a jury trial, he is entitled to minimum due process rights in relation to the determination of pre-sentence custody credits. (*People v. Duesler* (1988) 203 Cal.App.3d 273, 277 [citing *Wolff v. McDonnell* (1974) 418 U.S. 539 for requirement of minimum due process].) Appellant has the right to an adjudicative hearing. (*People v. Duesler*, *supra*, 203 Cal.App.3d at p. 277.) "[T]he People have the

⁴ Appellant also contends that he is similarly situated to all criminal defendants who have a prior conviction upon which the state relied in order to increase the defendant's sentence and that equal protection principles require the People to prove his prior conviction beyond a reasonable doubt to a jury. Appellant's prior conviction does not increase his sentence. Appellant is similarly situated only to criminal defendants who have their presentence credits reduced or limited. He is being afforded the same protections as those defendants. His equal protection claim thus fails.

burden to show that a defendant is not entitled to Penal Code section 4019 credits." (*Id.* at p. 276.) The People must produce "some evidence" that appellant suffered a prior strike conviction. (See *id.* at p. 277 [citing *Wolff, supra*, which includes as part of minimum due process the requirement that the state present "some evidence" to support reductions in presentence credit].)

There was no evidence presented in that trial court to show that appellant suffered a prior strike conviction. As noted in the concurring opinion, even the probation report, which is normally relied on by the sentencing court, does not directly state that appellant suffered a prior strike conviction for robbery. This matter must be remanded for a hearing that comports with minimum due process.

Disposition

This matter is remanded to the trial court with directions to either hold a hearing on the prior serious conviction allegation or to strike the conviction for purposes of section 4019.

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ARMSTRONG, J.

I concur:

MOSK, J.

I concur in of my colleagues' reversal of the presentence conduct credit award. Page nine of the probation report states defendant was previously charged with second degree robbery. However, page nine also states defendant was sentenced to prison for 16 months. No robbery term can be for only 16 months. (Pen. Code, § 213, subd. (a).) The probation report never directly states defendant was convicted in 1992 of robbery. The probation report merely states he was charged with robbery. If previously convicted of robbery, defendant's presentence credits would be calculated pursuant to former Penal Code section 4019, subdivisions (b)(2) and (c)(2). (Stats. 2009, 3rd Ex. Sess., ch. 28, § 50; Pen. Code, §§ 667.5, subd. (c)(9), 1192.7, subd. (c)(19).) Thus, there is insufficient evidence, for due process purposes, to support the trial court's finding defendant had previously sustained a serious prior felony conviction which would reduce his presentence conduct credits. If the probation report stated defendant was convicted of robbery, no due process issues would be present in my view. (*People v. Cain* (2000) 82 Cal.App.4th 81, 86 [due process rights satisfied if probation report lists amount of claimed restitution and defendant can contest the amount]; *People v. Bustamante* (1992) 7 Cal.App.4th 722, 726 [no due process violation occurred when there was "some substantial basis for believing the information contained in the probation report is accurate and reliable"]; see *People v. Peterson* (1973) 9 Cal.3d 717, 725-726 [use of hearsay declarant's statements accusing the defendant of selling heroin at probation hearing not fundamentally unfair].) But here, the probation report contains insufficient evidence defendant was previously convicted of robbery.

TURNER, P. J.